INDEX

	PAGE
Preliminary Statement	1
Argument	
I. *The Use Tax Assessments*	2
Ownership	3
Benefit	10
II. *The Penalty Assessments*	14
Conclusion	16

Table of Cases

American Oil Co. v. *Neill*, 380 U.S. 451	9
Brown v. *Western Railway of Alabama*, 338 U.S. 294, 296	4
Farmers' Loan and Trust Company v. *Minnesota*, 280 U.S. 204, 214, 215	8
Kirke v. *Texas Co.*, 186 F. 2d 643, 647 (7th Cir. 1951)	4
Leimer v. *State Mutual Life Assurance Co.*, 108 F. 2d 302, 306 (8th Cir. 1940)	4
McLeod v. *Dilworth Co.*, 322 U.S. 327, 330	7
Memphis Steam Laundry Cleaners, Inc. v. *Stone*, 342 U.S. 389, 392-393	13
Rearick v. *Pennsylvania*, 203 U.S. 507, 512	5
Rhode Island Trust Co. v. *Doughton*, 270 U.S. 69, 81	9
Richfield Oil Corporation v. *State Board of Equalization*, 329 U.S. 69, 84	5
Safe Deposit and Trust Company of Baltimore v. *Virginia*, 280 U.S. 83, 92	9

	PAGE
Spector Motor Service, Inc. v. *McLaughlin*, 323 U.S. 101, 104	5
State Tax Commission v. *Aldrich*, 316 U.S. 174, 182	5
Truax v. *Corrigan*, 257 U.S. 312, 324	4
Ward v. *Krinsky*, 259 U.S. 503, 520	5
Statutes	
Illinois Civil Practice Act, Ill. Rev. Stat. 1963, c. 110, Sec. 37	4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1067

MILLER BREWING COMPANY, a Wisconsin corporation,
Appellant,

v.

THEODORE JONES as Director of Revenue of the State of Illinois.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS

PRELIMINARY STATEMENT

In response to Miller Brewing Company ("Appellant")'s Statement As To Jurisdiction, Theodore Jones as Director of Revenue of the State of Illinois (the "Revenue Director") filed a Motion To Dismiss this appeal on the ground that the Federal questions presented are not substantial. In support of that Motion, the Revenue Director argued:

> (1) The substantive (Due Process-Commerce Clause) question was correctly decided by the Illinois Supreme Court "• • • either on the basis that it [Appellant] was the owner in fact of said tangible personal property or that it received a benefit from its use within the State of Illinois." (Motion To Dismiss p. 7).

(2) The procedural penalty (Due Process) question also was correctly decided by the Illinois Supreme Court because its resolution required a simple determination as to "* * * whether the State of Illinois afforded the plaintiff *any* method [emphasis supplied] to test the validity of the proposed assessment without incurring liability for the twenty-five per cent (25%) penalty." (Motion To Dismiss p. 9).

Ordinarily a Motion To Dismiss a Jurisdictional Statement would responsively join issue on the single question of whether substantial Federal questions exist and no reply by the Appellant would be necessary. In this particular case, however, Appellant must respond because of several fanciful misstatements of fact and misleading summations of law. The Revenue Director should be without right to do these things in an attempt to have an Appeal summarily dismissed.

ARGUMENT

I

The Use Tax Assessments

Upon the question of whether the tax assessments were within the taxing power of the State of Illinois and did not violate the Due Process and Commerce Clauses of the United States Constitution, the Revenue Director states his ultimate theory supporting the propriety of those assessments as follows (Motion To Dismiss p. 7):

> "The Plaintiff has exercised a right and power incident to the ownership of tangible personal property in the State of Illinois and is therefore liable for a use tax thereon, either on the basis that it was the owner in fact of said tangible personal property or that it received a benefit from its use within the State of Illinois."

Since the theory has been disjunctively pronounced, it will be disjunctively answered.

Ownership

The Revenue Director justifies the use tax assessments principally by asserting that the Illinois Supreme Court has determined that Appellant "owned" the POS advertising items when they were located within the State of Illinois. The assertion can be dealt with upon its merits, but there is no excuse for the concurrent misstatement of fact: "Thus this [i.e., the supposed rule against making gifts of corporate assets] would negate any intent on the part of the plaintiff to expend such a large sum of corporate funds without title remaining in the corporation." (Motion To Dismiss p. 5). Whether the Revenue Director likes it or not, however, the Record conclusively and properly discloses that "• • • it was never the intent of Plaintiff to acquire title to or a property interest in said POS advertising items. • • •" (R. 3 pp. 37, 39); the Illinois Supreme Court held that Appellant owned the POS advertising items *despite* its firm intentions to the contrary and it is hot seemly to suggest otherwise in a Motion To Dismiss an appeal for insubstantiality.

In an apparent attempt to prevent this Court from inquiring into the question of "ownership" if it considers that question to be relevant, the Revenue Director observed that "Illinois is a fact pleading jurisdiction" and "[T]he Illinois Supreme Court ruled, that Plaintiff which had the burden of proof on the issue did not allege sufficient facts to establish that it was not the owner of these goods in Illinois." (Motion To Dismiss p. 4). Aside from the fact that technical concepts of "title" and "ownership" have never been considered relevant in determining the validity of state taxing questions, however, it is well settled indeed that a decision of the questions presented in this case must not be predicated upon technical deficiencies in pleadings or Illinois law concerning them (Statement As To Jurisdiction

p. 13).[1] Upon the point of "ownership", therefore, the Illinois Supreme Court has now spoken definitively only upon the question of what will be an insufficient plea of "non-ownership" as a matter of Illinois local law.[2]

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[1] *Brown* v. *Western Railway of Alabama*, 338 U.S. 294, 296: "It is contended that this construction of the Complaint is binding on us. • • • To what extent Rules of Practice and Procedure may themselves dig into 'substantive rights' is a troublesome question at best as is shown in the very case on which Respondent relies. • • • A long series of cases previously decided • • • makes it our duty to construe the allegations of this Complaint ourselves in order to determine whether Petitioner has been denied a right of trial granted him by Congress. This Federal right cannot be defeated by the forms of local practice. • • • And we cannot accept as final a State Court's interpretation of allegations in a Complaint asserting it. • • •"

Truax v. *Corrigan*, 257 U.S. 312, 324: "The facts alleged are admitted by the demurrer, and in determining their legal effect as a deprivation of Plaintiffs' legal rights under the Fourteenth Amendment, we are at ascfull liberty to consider them as was the State Supreme Court. • • • Nor does the Court's declaration that the statute is a rule of evidence bind us in such an investigation."

[2] The Federal Rule of Pleading would be contrary to the Illinois Rule. *Kirke* v. *Texas Co.*, 186 F.2d 643, 647 (7th Cir. 1951) ("No matter how likely it may seem that the pleader will be unable to prove his case, he is entitled, upon averring a claim, to an opportunity to try to prove it); *Leimer* v. *State Mutual Life Assurance Co.*, 108 F.2d 302, 306 (8th Cir. 1940) ("[W]e think there is no justification for dismissing a Complaint for insufficiency of statement, except where it appears to a certainty that the Plaintiff would be entitled to no relief under any state of facts which could be proved in support of the claim.").

Such expressions are based upon the availability under the Federal Rules of Civil Procedure of a Bill of Particulars to a party confused by the pleadings of his opponent. The Illinois Civil Practice Act also would have permitted the Revenue Director to have secured a Bill of Particulars supplementing Appellant's plea of non-ownership, 110 *SHA Ill. Ann. Stat.* §37.

The Revenue Director's appeal to Illinois law of pleading and practice is really only an expediency designed to shore up the "ownership" rationale which he likes. He has not responded to the well established rules that no "form of words" will justify a particular State tax (Statement As To Jurisdiction p. 13), nor does he appear to be disturbed by cases such as the following which establish the direction of inquiry to be made by this Court in reviewing a State tax case:

> *Richfield Oil Corporation* v. *State Board of Equalization*, 329 U.S. 69, 84: "The interpretation of a State taxing statute by a State Court is '• • • not determinative of the question whether the tax deprives a taxpayer of a Federal right, which issue turns not on characterization which a State has given the tax, but on its operation and effect.'"
>
> *State Tax Commission* v. *Aldrich*, 316 U.S. 174, 182: "• • • [T]he taxing power is an incident of government. It does not derive from technical legal concepts. • • •"
>
> *Ward* v. *Krinsky*, 259 U.S. 503, 520: The United States Supreme Court is "• • • bound by *construction* of the statute adopted by the state court • • • [but] is not concluded by its *reasoning* but must exercise an independent judgment, when called upon to determine the Federal question whether the act as construed and applied, is repugnant to the restrictions of the [Fourteenth] Amendment."
>
> *Rearick* v. *Pennsylvania*, 203 U.S. 507, 512: Federal constitutional questions are "• • • not drawn from the 'witty diversities' • • • of the law of sales."

The function of a State Court in a case such as this is merely to "• • • say what is the subject matter which she has sought to tax and what is the calculus of the tax she seeks." *Spector Motor Service, Inc.* v. *McLaughlin*, 323 U.S. 101, 104.

Abstractly considered apart from the attempt to evade a full consideration of this case it would be difficult to comprehend why the Revenue Director has taken the position that the question of "ownership" is of any moment whatever. The Cook County Circuit Court, for example, rejected completely the question of "ownership" as being of any relevance (R. 3 p. 80):

> "THE COURT: Ownership has nothing whatever to do with it. It is a question of use, unless a user is doing it contrary to his right under the law to do so because of the owner's objection to it. I don't think purchase has anything to do with it at all. It is a question of use, pure and simple."

That position of the Circuit Court was in perfect agreement with that taken by the Revenue Director himself in arguing the case (R. 3 p. 75):

> "• • • The false premise involved [in Appellant's argument] is the assumption that the use tax cannot apply to the plaintiff if the plaintiff, Miller Brewing Company, does not own the subject property when it is in Illinois, but since the Act nowhere refers to a tax upon ownership in Illinois, plaintiff has created an illusory distinction which is without significance within the meaning of the Act.
>
> "All that matters is that plaintiff has used personal property within the definition of use in the Act, and that plaintiff has caused its property so used to be delivered and distributed throughout the State of Illinois. • • •"

Why then the attachment to the attenuated theory of "ownership" which was later developed; the answer is apparent from the Revenue Director's statement of the issues (Motion To Dismiss pp. 2, 3):

> "• • • The first question with which we are confronted is whether the State of Illinois may constitutionally exact a tax upon the aforementioned tangible personal property.

> "The tangible personal property, which is the subject matter of this suit, falls within the taxing jurisdiction of the State of Illinois, for although it was manufactured elsewhere, it came to rest in Illinois for use and consumption."

But the rationalization that for purposes of this particular case the Illinois Use Tax Act as applied can be justified as a "property" tax based upon "ownership" is itself subject to serious doubt.

McLeod v. *Dilworth Co.*, 322 U.S. 327, concerned the question whether an Arkansas tax which had been construed by the Arkansas courts as levying a sales tax and not a use tax violated the Commerce Clause of the Federal Constitution. The tax could not be sustained under the constitutional principles applicable to sales tax because all acts by the taxpayer in reference to these sales occurred outside of Arkansas (as did all acts by Appellant in reference to the POS advertising items in this case). The Arkansas taxing authorities argued alternatively, however, that the tax should be sustained as a Use Tax collection statute albeit it was called a sales tax. This Court rejected that argument (322 U.S. 327, 330):

> "* * * It is suggested * * * that Arkansas could have levied a tax for the same amount on the use of these goods in Arkansas by the Arkansas buyer, and that such a use tax would not exceed the limits upon State power derived from the United States Constitution. Whatever might be the fate of such a tax * * *, the not too short answer is that Arkansas has chosen not to impose such a use tax * * *. A sales tax and a use tax in many instances may bring about the same results, but they are different in conception, are assessments upon different transactions, and in the interlacing of the two legislative authorities within our federation they have to justify themselves on different constitutional grounds. * * *"

There is a difference between privilege taxes and property taxes and different constitutional principles are applicable to each of them. This Court once decided that the State of Minnesota had no power to tax the transfer by inheritance of obligations issued by Minnesota which were owned by a decedent who was domiciled in another state at the time of his death. *Farmers' Loan and Trust Company* v. *Minnesota*, 280 U.S. 204. Although the majority appeared to base its opinion of nontaxability upon the ultimate conclusion that the "bonds and certificates of the decedent had acquired permanent situs for taxation in New York", Mr. Justice Stone filed a concurring opinion (280 U.S. 204, 214, 215):

> "• • • [W]e are not here concerned with a property tax, but with an excise or privilege tax imposed on the transfer of an intangible • • • and to sustain a privilege tax the privilege must be enjoyed in the state imposing it • • •. It is enough, I think, to uphold the present decision that the transfer was effected in New York by one domiciled there • • •. So far as the transfer • • • is concerned, it is New York law and not that of Minnesota which, by generally accepted rules, is applied there and receives recognition elsewhere. • • • Once the bonds had passed beyond the state and were acquired by an owner domiciled elsewhere, the law of Minnesota neither protected nor could it withhold the power of transfer or prescribe its terms.
>
> "• • • [G]ranting that the continued existence of the contract rested in part on the law of Minnesota, the relation of that law to the transfer in New York, both in point of theory and in every practical aspect, appears to me to be too attenuated to constitute any reasonable basis for deeming the transfer to be within the taxing jurisdiction of Minnesota."

Since Appellant exercised privileges with respect to the POS advertising items only in states other than Illinois (R. 3 p. 37) and neither used nor controlled the use of those

items within Illinois (R. 3 p. 40), certainly the relation of Illinois law to the privileges exercised with respect to the items by Appellant "* * * both in point of theory and in every practical aspect * * * [Is] too attenuated to constitute any reasonable basis for deeming the * * * [use] to be within the taxing jurisdiction of * * * [Illinois]."

Even if a state were permitted to justify a given privilege tax by applying the principles applicable to property taxes, it must do so without fictionalizing a theory of constructive ownership. This Court's most recent rejection of such a fictional approach was in *American Oil Co.* v. *Neill*, 380 U.S. 451 (Statement As To Jurisdiction pp. 3, 12, 14, 15, 17). In that case the State of Idaho declared in the taxing statute itself that one who sold motor fuel outside of Idaho for importation into that state was "constructive recipient" of the gasoline when it was received in Idaho. Likewise, an attempt by Virginia to justify a state privilege (death) tax by declaring that the trust beneficiaries who lived in Virginia were the "real owners" of the trust corpus which was not itself within the tax jurisdiction of Virginia was rejected. *Safe Deposit and Trust Company of Baltimore* v. *Virginia*, 280 U.S. 83, 92 ("We need not make any nice inquiry concerning the ultimate or equitable ownership of the securities or the exact nature of the interest held by the son."). *Rhode Island Trust Co.* v. *Doughton*, 270 U.S. 69, held that North Carolina was without power to assess a privilege tax against a non-resident who owned shares of stock in a New Jersey corporation at the time of his death. This Court rejected North Carolina's attempt to justify the tax by arguing, alternatively, that the decedent really "owned" the assets of the corporation which were located within North Carolina when he died (270 U.S. 69, 81):

> "* * * In this case the jurisdiction of North Carolina rests on the claim that, because the New Jersey corpora-

> tion has two-thirds of its property in North Carolina, the State may treat shares of its stock as having a situs in North Carolina to the extent of the ratio in value of its property in North Carolina to all of its property. This is on the theory that the stockholders are the owners of the property of the corporation, and the state which has jurisdiction of any of the corporate property has *pro tanto* jurisdiction of his shares of stock. We cannot concur in this view. * * *"

So this Court has stood fast throughout the years against attempts by States to justify privilege taxes as property taxes in particular cases through the application of a fictitious cluster of theories of "ownership." Even if the only question presented by this case were whether this fundamental, firm position should now be abandoned, that question by itself would certainly be substantial enough to merit a full and complete consideration by this Court.

Benefit

The second, distinct theory by which the Revenue Director attempts to prevent full consideration of the use tax assessment issue of this case is that Appellant "received a benefit" from the use of the POS advertising items when they were located within the State of Illinois. Presumably this argument attempts to meet the *quid pro quo* essentials for the exercise of State taxing powers (Statement As To Jurisdiction pp. 14-15). As was true in the development of the "ownership" theories, however, no authority is supplied on the point and the Motion To Dismiss is not responsive to the Statement As To Jurisdiction.

The Motion To Dismiss, assuming that this Court will accede to the "ownership" property tax rationalization of the use tax question, urges that the *quid pro quo* would then constitute the alleged availability of the usual protections afforded by Illinois law to owners of any personal property

located within Illinois, such as the availability of the Illinois Criminal Code to pursue and punish thieves and an imaginary right to recover insurance proceeds (Motion To Dismiss p. 7). Once again there is no excuse for such a statement; the Revenue Director stubbornly and indefensibly refuses to accept this case as it is, not as he wishes it were, and the clear fact that the *only* relationship of Appellant to the POS advertising items was that it paid for their manufacture and directed—outside of Illinois—the disposition which should be made of them. Upon this specific point of insurance, he not only supplies no factual authority for the assertion but, more seriously, ignores the clear fact that "* * * [r]isk of loss during shipment was in the consignees [i.e., the Illinois wholesale distributors] and all claims for damage were to be made by the consignees." (R. 3 p. 39). In any event, this first theory of *quid pro quo* is no stronger than the substantive "ownership" rationalization itself upon which it is completely dependent.

The Revenue Director's alternative theory of *quid pro quo* does at least have the virtue of absolute simplicity (Motion To Dismiss p. 6):

> "[E]ven if, as Plaintiff suggests, it did not own the property, as such, within the State of Illinois, it is liable for the tax thereon if it exercised *'any'* right or power over the personal property incident to the ownership of it. It did not have to own the property to be subject to the use tax."

This of course was the theory upon which the assessments were originally made (R. 3 p. 41) and was the way the case originally was presented to the Circuit Court of Cook County by the Revenue Director.

Once again he unfairly misstates the facts of the case by asserting "that the plaintiff admits that the property was manufactured and the funds expended to its ultimate bene-

fit" (Motion To Dismiss p. 7). No reference is made to the Record to support that assertion, of course, but perhaps the intent is to refer to the fact that the "• • • Illinois independent wholesale distributors usually distributed the POS advertising items to various Illinois retailers who would then use said items at the point-of-sale to encourage a demand for plaintiff's malt beverage products among ultimate consumers thereof." (R. 3 p. 40).

Admittedly the POS advertising items—when and if displayed within the State of Illinois—advertised products manufactured by Appellant; but that fact does not infuse the "ultimate beneficiary" statement with meaning. The Illinois retailers and distributors—independent businessmen all—were benefited also and to a greater extent than Appellant. Indeed, it would appear that the Illinois consumers themselves were more likely to be the "ultimate beneficiaries", or perhaps, even the State of Illinois itself when it collected use taxes from them for exercising their privileges of consuming Appellant's products within Illinois. In any event, neither that unjustified assertion of "ultimate benefit" nor the multiple often metaphysical problems which could arise from it have any relevancy to the question presented by the Motion To Dismiss.

Until this point, Appellant had been confused with the following analysis of the use tax issue of this case made by the Revenue Director (Motion To Dismiss p. 3):

> "In essence, the Plaintiff contends that the imposition of the use tax on the aforementioned point-of-sale of tangible personal property [sic!], which was purchased and manufactured outside of Illinois, creates an unconstitutional burden upon interstate commerce."

From the beginning of this litigation the Revenue Director has known that it has been the primary position of Appellant that both the use tax assessment and the penalty assessment

are unconstitutional as violative of the Due Process Clause of the Fourteenth Amendment. But, upon reflection, perhaps that statement of the "essence" of this case really is more sophisticated than it appears, because when all of the fictions are rejected and issue is joined on the facts of this case the only question remaining will indeed seriously and fundamentally challenge the integrity of the Commerce Clause itself: may the State of Illinois assess a tax against Appellant because there are located within Illinois POS advertising items which are utilized by Illinois retailers in an attempt to creat a demand for products produced by Appellant in other States?

Since benefits received from a taxing state never justify a state tax not otherwise authorized (Statement As To Jurisdiction p. 15), and the Revenue Director does not contend otherwise in his Motion To Dismiss, necessarily his point must be that the State of Illinois does have power in this case to tax the "benefit" itself. It is stated that "benefit" is the same as "enjoyment" and that this particular tax is justified because Appellant "• • • has already exercised at least one of the rights incident to ownership: Enjoyment." (Motion To Dismiss p. 7).

Without respect to whether Illinois or any other state could constitutionally assess a tax based upon "enjoyment" in the abstract in some other situation, certainly it cannot do so where the "enjoyment" tax is limited to the attempted creation of a demand within Illinois for products of Appellant which are produced only outside of Illinois and in the course of Appellant's interstate commerce activities. In *Memphis Steam Laundry Cleaner, Inc.* v. *Stone*, 342 U.S. 389, this Court held that a Mississippi "privilege tax" which was laid upon each person "soliciting business" for a laundry not licensed in Mississippi was invalid under the Commerce Clause. Mississippi's argument that it was simply

seeking to tax one separate and distinct "incident" and not interstate commerce itself was rejected (342 U.S. 389, 392-393):

> "• • • In the long line of 'drummer' cases, beginning with *Robbins* v. *Shelby County Taxing District*, • • • this Court has held that a tax imposed upon the solicitation of interstate business is a tax upon interstate commerce itself. Whether or not solicitation of interstate business may be regarded as a local incident of interstate commerce, the Court has not permitted state taxation to carve out this incident from the integral economic process of interstate commerce. As the Court noted last term in a case involving door-to-door solicitation of interstate business, 'interstate commerce itself knocks on the local door.' • • •."

The POS advertising items also "knock on the local door" and, indeed, are the most loyal drummers of all; uncompromised by heartbeat or other human frailties, unequivocally and absolutely dedicated to the single unswerving purpose of creating a demand in Illinois for the products Appellant manufactures in Wisconsin. Certainly if this is the "essence" of the use tax assessment question as the Revenue Director urges, it also is subtantial enough to merit full presentation and consideration.

II

The Penalty Assessments

If Illinois had chosen to make available to taxpayers "plain, speedy and efficient" remedies to contest Illinois Use Taxes and Illinois Retailers' Occupation Taxes, this case would never have developed as it did; those remedies would have been pursued with vigor. The only remedies available to Appellant—or any other taxpayer aggrieved by assessment of Illinois Use or Retailers' Occupation Taxes—however, are not, "plain, speedy and efficient" (Statement As To

Jurisdiction pp. 10, 15-16). The Revenue Director has never asserted otherwise—either in the Circuit Court of Cook County in this case where he could have moved to dismiss for failure to exhaust administrative remedies (in which case Appellant would have returned to the United States District Court as it was invited to do), or in the Motion To Dismiss which it filed in response to the Statement As To Jurisdiction now under consideration. Presumably, then, the argument of the Revenue Director is that the penalty questions are insubstantial despite the fact that the only alternative remedy available to Appellant fell below the constitutional requirements (R. 3 pp. 34-36).

The Statement As To Jurisdiction clearly discloses that the "procedural due process penalty question" presented was based in part upon the lack of any valid, understandable statute authorizing the penalty (Statement As To Jurisdiction p. 7 at II(2)). It is grossly unfair, therefore, for the statement to be made that "Section 12 of the Use Tax Act and • • • Section 12 of the Service Use Tax Act • • • specifically incorporate Section 5 of the Retailers' Occupation Tax Act which require the imposition of a twenty five per cent (25%) penalty where the taxpayer fails to file a return." (Motion To Dismiss p. 8). In point of fact, however, the statute specifically imposes penalties only against "• • • any person engaged in the business of selling tangible personal property at retail" (Statement As To Jurisdiction p. 5) and Appellant is not and has never been engaged in that business. Even if such a method of incorporating penalties by reference with incomprehensible results were not by itself a substantial question, certainly it lends a good deal of additional substance to the primary penalty question of whether the penalties attempt to close the courthouse doors to taxpayers in Illinois (Statement As To Jurisdiction pp. 15-16).

The question is not whether Illinois made available to Appellant "any remedy" (Motion To Dismiss p. 9) but rather whether the administrative remedies which it did "make available" alternative to the seeking of judicial relief met the constitutional standards. It is not appropriate for the Revenue Director nor for the Illinois Supreme Court to cite Federal cases to support the assertion that "the imposition of a twenty-five per cent (25%) penalty for failure to file a return has been approved in many cases." (Motion To Dismiss p. 10). It is almost beyond comprehension that any one would consciously draw a parallel between Illinois' administrative tax remedies and those commendable, superior administrative remedies provided in our Federal tax system. Naturally this Court may deal here only with the question of the penalty aspects of the Illinois procedures as applied in this particular case, but in doing so it might also ignite the spark which would civilize the Illinois administrative procedures. This would certainly be an impressive collateral benefit of wide social importance.

CONCLUSION

The Motion To Dismiss this appeal summarily asserts that the Federal questions presented are not substantial but no response is made to a single case preliminarily cited by Appellant in the Statement As To Jurisdiction. Instead, a series of fictions are pronounced which are not only outside of the Record but on occasion directly contrary to it.

Upon the substantive question of the constitutionality of the use tax assessments, there is nothing in the Motion To Dismiss which even casts doubt upon certain fundamental constitutional principles applicable here: (1) the State of Illinois may not tax privileges exercised only outside the State of Illinois and in the course of interstate commerce; (2) the State of Illinois may not justify its use tax as

applied here as a "property" tax on "ownership" when that supposed "ownership" is detached from fact and predicated entirely on a series of elaborate and attenuated fictions; and (3) the State of Illinois may not justify the use tax assessed here as one upon the "enjoyment" Appellant might derive from the fact that the POS advertising items located within Illinois advertise its products which are manufactured in other states.

Upon the procedural Due Process question concerning the twenty-five per cent (25%) penalties, the Motion To Dismiss likewise fails to cast doubt upon the important principle that since Illinois did not make available to Appellant "plain, speedy and efficient" administrative remedies to contest the use taxes it may not assess a penalty against Appellant for seeking judicial injunctive relief from the Illinois state courts.

Since there is nothing presented in the Motion To Dismiss which even tends to support the assertion that the Federal questions presented are not substantial, Appellant urges that the said Motion be denied.

Respectfully submitted,

FRANK H. URIELL
PAUL A. TESCHNER
69 West Washington Street
Chicago, Illinois 60602
FI 6-0900

Attorneys for Appellant

Of Counsel:

POPE, BALLARD, URIELL, KENNEDY,
SHEPARD & FOWLE
69 West Washington Street
Chicago, Illinois 60602